

WILMERHALE

September 24, 2014

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**VIA ECF**

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The Honorable Paul A. Crotty  
U.S. District Court, Southern District of New York  
500 Pearl Street, Chambers 1350  
New York, New York 10007-1312

Re: *Gao v. JPMorgan Chase & Co. and Chase Bank USA, N.A.*, No. 14 Civ. 4281

Dear Judge Crotty:

I write on behalf of defendants JPMorgan Chase & Co. and Chase Bank USA, N.A. (collectively “Chase”) to request a pre-motion conference in advance of filing a motion to dismiss Plaintiffs’ amended complaint under Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> The Court has not scheduled a pretrial conference.

Plaintiffs held Chase Freedom credit cards, which were associated with the Chase Ultimate Rewards program. Under that program, cardholders earn points or rebates for the dollars they spend on their credit cards. Subject to various terms and restrictions, the points may be redeemed for rewards such as travel, gift cards, merchandise, and tickets to events. Plaintiffs allege that they earned Ultimate Rewards points through the use of their Chase Freedom cards and that Chase improperly forfeited those points when it closed their accounts. They purport to sue on behalf of a putative class of similarly situated credit cardholders.

The amended complaint should be dismissed for failure to state a claim.

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<sup>1</sup> Pursuant to the Court’s Individual Practices Rule 3.B, Chase submits this letter in lieu of filing an answer, which would otherwise be due September 29, 2014. Plaintiff Harry Gao filed his original complaint on June 13, 2014. Chase executed a waiver of service on June 27, 2014, pursuant to which Chase was to respond to the complaint by August 18, 2014. Before Chase responded to the complaint, Gao filed an amended complaint on August 15, 2014, adding plaintiff Roberta Socall and numerous allegations specific to her. On August 21, 2014, the Court granted Chase’s request for an extension of time to respond to the amended complaint.

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*First*, Plaintiffs' claims for breach of contract (Count I), good faith and fair dealing (Count II), and unjust enrichment (Count V) fail in light of the express terms of their contracts with Chase, versions of which are attached to the amended complaint. Specifically, Plaintiffs' credit-card agreements state that Chase may close their Accounts "at any time for any reason." Am. Compl., Ex. B at 3. The rules and regulations governing Plaintiffs' rewards program in turn state that if a cardholder's "Account is closed for any reason, and/or there is any fraud or abuse related to the accrual of points or rebates, as applicable, we reserve the right ... to cause you to forfeit any points/rebates." Am. Compl., Ex. A. The rules and regulations likewise provide, "If your Account is closed for any reason, your membership in the Program will be terminated." *Id.*

Under applicable Delaware law,<sup>2</sup> no claim for breach of contract can lie where, as here, the contract permits the challenged conduct. *Grasso v. First USA Bank*, 713 A.2d 304, 309-11 (Del. Super. Ct. 1998). Likewise, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing fails because the "[t]he implied covenant will not infer language that contradicts a clear exercise of an express contractual right." *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010). And because Plaintiffs' relationships with Chase are governed by written contracts, they cannot state a claim for unjust enrichment. *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, No. CIV.A. 762-N, 2005 WL 2130607, at \*8 (Del. Ch. Aug. 26, 2005).

*Second*, while the basis for Plaintiffs' fraudulent-inducement claim (Count II) is unclear, the claim fails regardless of how the Court construes it. To the extent the claim turns on

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<sup>2</sup> Delaware law governs Plaintiffs' agreements and credit-card accounts. *See* Compl., Ex. B at 4.

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unspecified “advertising and promotional materials,” Am. Compl. ¶ 63, Plaintiffs fail to state the claim with the particularity required by Fed. R. Civ. P. 9(b), including failing to specify the statements that Plaintiffs contend were fraudulent. *See Kalie v. Bank of Am. Corp.*, 297 F.R.D. 552, 556 (S.D.N.Y. 2013). To the extent the claim turns on the statement in the Ultimate Rewards Rules and Regulations that “Points/rebates earned in this program will not expire,” Am. Compl. ¶¶ 38, 42, it fails because it improperly attempts to recast a breach of contract claim as a fraud claim. *See Pinkert v. John J. Olivieri, P.A.*, No. Civ. A 99-380, 2001 WL 641737, at \*5 (D. Del. May 24, 2001). In any event, Plaintiffs cannot claim that this statement was fraudulent because, among other things, the Ultimate Rewards Rules and Regulations explicitly provide that points may be forfeited if the account is closed. *See Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co.*, 224 F. Supp. 2d 520, 533 (W.D.N.Y. 2002).

*Third*, Plaintiffs’ claims under the Ohio Consumer Sales Practices Act and Florida Deceptive and Unfair Trade Practices Act (Count IV) fail because neither statute applies to national banks such as Chase.<sup>3</sup> *See Bridge v. Ocwen Fed. Bank*, No. 1:07 CV 2739, 2014 WL 2442183, at \*10 (N.D. Ohio May 30, 2014); *Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 778 (Fla. Dist. Ct. App. 2007). The claims also fail because Plaintiffs have not plausibly alleged any actionable fraud or deception.

For these reasons, Defendants seek to move to dismiss the amended complaint in its entirety. Defendants are available for a pre-motion conference at the Court’s convenience.

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<sup>3</sup> Plaintiffs allege violations under Ohio and Florida statutes because, according to the amended complaint, Gao resides in Ohio and Socall resides in Florida. Am. Compl. ¶¶ 18, 19.

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Respectfully submitted,

/s/ Noah Levine  
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cc: All counsel of record (via ECF)